93-848

No._____

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In the Supreme Court of the United States

October Term, 1993

STANDARD FIRE INSURANCE COMPANY,

Petitioner,

v.

FRANK BURNABY,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL

APPENDIX TO PETITION FOR WRIT OF CERTIORARI VOLUME II OF II (Appendix H To J)

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TABLE OF APPENDICES

Page

APPENDIX A

Opinion of the California Court of Appeal A-1

APPENDIX B

Order of the California Supreme Court Denying Review and Directing the Court of Appeal Opinion Not to be Published B-1

APPENDIX C

Judgment of the Trial Court C-1

APPENDIX D

Order of the Court of Appeal Denying Rehearing . . . D-1

APPENDIX E

Second Amended Complaint E-1

APPENDIX F

Jury Instruction on Punitive Damages F-1

APPENDIX G

Excerpt from the Defenant's Appellant's Opening Brief Filed in the Court of Appeal G-1

APPENDIX H

Petition for Review Filed by the Defendant in the California Supreme Court H-1

APPENDIX I

Section 3294 of the California *Civil Code* I-1

APPENDIX J

Fourteenth Amendment to the Constitution of the United States J-1

COPY

Supreme Court Case No: S033800 Second Civil No. B047665

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

FRANK BURNABY,

Plaintiff and Respondent,

v.

STANDARD FIRE INSURANCE COMPANY,

Defendant, Appellant, and Petitioner.

Review Sought of the Decision Rendered
by the Court of Appeal of the State of California,
Second Appellate District, Division One

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PETITION FOR REVIEW

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APPENDIX H

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

FRANK BURNABY,

Plaintiff and Respondent,

v.

STANDARD FIRE INSURANCE COMPANY,

Defendant, Appellant, and Petitioner.

PETITION FOR REVIEW

INTRODUCTION AND STATEMENT OF ISSUES

To the Honorable Malcolm M. Lucas, Chief Justice, and to the Honorable Associate Justices of the Supreme Court of the State of California:

Something is wrong with first party insurance bad faith law, if an insurer can be held liable for policy benefits and massive extracontractual damages for denying a claim based on information from the insured himself. Something is wrong with the civil jury trial system, if an expert witness is permitted to instruct the jury on the law, and if a jury is permitted to award punitive damages based on a finding of "fraud," where no such claim has been pleaded or proved. Something is wrong with the whole legal system, if a person may maintain two separate lawsuits seeking recovery for the same loss, based on different versions of the same facts, and recover twice for that loss against

different defendants. Yet, in a published opinion, a Court of Appeal panel has placed a stamp of approval on all of these things. The opinion will, unless this court intervenes, spawn endless litigation, drive up insurance rates, and encourage false and fraudulent claims.

Plaintiff Frank Burnaby has long been, and is now, the owner of a single family residence located in the Big Rock Mesa area of Los Angeles County. Unlike most residents of the prosperous area, Mr. Burnaby had no insurance at the time that he first learned of the Big Rock Mesa landslide in the fall of 1983. Nonetheless, he filed claims against the County and other governmental entities, whose conduct caused the landslide, he claimed, made the Burnaby residence a $1.1 million loss. These claims were successfully pursued. He also proceeded to buy a new policy of homeowner's insurance from Standard Fire Insurance Company, the policy that is the subject of this litigation. Standard denied the Burnaby claim, on the ground that the plaintiff concealed material facts when he bought his policy, and on the additional ground that the date of loss of the Burnaby residence was prior to the inception of Standard's contract of insurance. Undaunted, Mr. Burnaby sued Standard, and prevailed at trial. He has recovered the amount of money claimed to be due under Standard's policy, substantial extracontractual compensatory damages, and punitive damages in the amount of half a million dollars.

In a reported opinion with ominous implications, the Court of Appeal has upheld the unjust judgment of the trial court. In seeking review of the opinion of the Court of Appeal, defendant Standard Fire Insurance Company presents the following issues of law:

1. In an action by the owner of a house for landslide damage against his homeowner's insurer, where the plaintiff has stated in writing and then in testimony under oath that the landslide damage occurred before the inception of the defendant insurer's policy, and where the plaintiff has successfully pursued another lawsuit based on this evidence, is the plaintiff estopped to deny that the landslide damage actually happened before the defendant's insurance policy was in effect?

2. Is it reversible error to permit a purported insurance expert to testify as to the requirements of the law, where the witness erroneously states, among other things, that an insurer may not properly deny a claim even where the great weight of the evidence presented to the insurer supports denial?

3. Is it reasonable as a matter of law, so as to immunize an insurer from extracontractual liability, for the insurer to deny a homeowner's claim for landslide damage based on statements from the homeowner himself indicating that the damage predated the insurer's policy?

4. Where an insurer is required to pay its insured for landslide damage to the insured's house, is the insurer entitled to a credit in the amount that the insured has

already been compensated by third parties for the same loss?

5. Is it erroneous and unconstitutional to interpret *Civil Code* section 3294(c)(3) so as to permit an award of punitive damages for "fraud," where no fraud claim has ever been pleaded or proved?

All of these questions should be answered "yes." They present important issues of law of statewide, perhaps national, importance. Some of these issues are already pending before this court.[1]

STATEMENT OF FACTS

Much of the evidence concerning Mr. Burnaby's alleged loss and the handling of his claim by Standard is in conflict. Nevertheless, the facts necessary to frame the issues set forth above are relatively simple and straightforward and, for the most part, undisputed.[2]

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[1] The issue of judicial estoppel is involved in *Montrose Chemical Corporation v. Admiral Insurance Company*, case number S026013, and in *Stonewall Insurance Company v. City of Palos Verdes Estates*, case number S027319. Issues involving the interpretation and application of the punitive damages statute are found in a variety of pending cases, including *Gourley v. State Farm Mutual Insurance Company*, case number S014133, *Wollersheim v. Church of Scientology*, case number S011790, *MGW, Inc. v. Fredericks Development Corporation*, case number S015966, and *Hilgedick v. Koehring Finance Corporation*, case number S017796.

[2] The record consists of a 20 volume clerk's transcript with 7,632 pages and a 16 volume reporter's transcript with 4,044 pages. This 11,676 page record was generated before and during a very long trial, which commenced on August 14, 1989, and ended on Halloween,

(continued...)

1. Mr. Burnaby, His House, and the Big Rock Mesa Landslide.

Mr. Frank Burnaby is a businessman, who works as a landscape lighting designer. He attended college, and now is the owner of his own business. [3 R.T. 2.] He is the owner of a single family residence located at 20743 Rock Point Way, Malibu, a ranch style home with three bedrooms and two bathrooms. It was built in the early 1960's, and was purchased by Mr. Burnaby in October of 1979. [3 R.T. 3.] Although he has owned the house on Rock Point Way continuously since 1979, Mr. Burnaby moved out in June of 1982, due to financial problems. He found that he could save money by renting the house and living in an apartment. [3 R.T. 8.] He was subsequently told that he could not renew his homeowner's policy with Standard unless he lived in the house. [3 R.T. 8.] He believed that homeowner's insurance was unavailable at any price if he did not live in the insured house. [3 R.T. 43.]

At the time that he moved out of his house, Mr. Burnaby had homeowner's insurance with Standard, which had a policy period of November 28, 1981, to November 28, 1982. [9 C.T. 3264-3283.] Mr. Burnaby was able to move back into his house in June of 1983. [3 R.T. 10.] However, he did not buy homeowner's insurance at that

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[2](...continued)
October 31, 1989. Much of the record relates to matters outside the scope of this petition. The abbreviation "C.T." refers to the clerk's transcript, while "R.T." designates the reporter's transcript. Volume numbers precede these abbreviations, and page numbers follow them. Due to the page limitation established by rule 28(e)(6) of the *Rules of Court*, the statement of facts contained in this petition is relatively short, but a more detailed one may be found in the appellant's opening brief.

time. In fact, his house remained uninsured until several months after Mr. Burnaby attended a public meeting concerning the Big Rock Mesa landslide that was held on September 19, 1983. [9 C.T. 3287; 3 R.T. 10-16.]

Unfortunately, the Big Rock Mesa area of Malibu has experienced massive landsliding. In the fall of 1983, the County of Los Angeles informed local homeowners that an incipient landslide might be developing on the Mesa. Among the various possible causes of the landslide were highway construction in the 1930's, improper development, failure of a local homeowner's organization to maintain drainage and pumping systems, and the failure of certain homeowners to maintain their septic tank systems properly.[3]

The Burnaby residence was inspected by a geologist retained by Standard, who submitted a detailed report dated October 23, 1984. [10 C.T. 3621-3634.] It was noted that the house still appeared to be "structurally sound." [10 C.T. 3627-3628.] The same geologist inspected the Burnaby residence a second time on May 31, 1985. [10 C.T. 3745-3750.] The inspection revealed that the property was "in much the same condition" as it had been the year before. [10 C.T. 3746.] The report concluded that "[t]he residence is habitable and does not appear to be in imminent danger." [10 C.T. 3747.] It was also noted that Mr. Burnaby was very lucky in that his house was located over bedrock tilted to the north, a favorable local condition. [10 C.T. 3746.]

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[3] The facts stated in this paragraph are derived from this court's opinion in *State Farm & Casualty Company v. Von Der Lieth*, 54 Cal.3d 1123, 1126-1129 (1991). Many of the same facts appear in the record of the present litigation, particularly in documentary evidence and in the testimony of expert witnesses.

2. The Differing Dates of Loss Claimed by Mr. Burnaby.

The key factual question in the handling of the Burnaby claim was the determination of the correct date of loss. Mr. Burnaby had insurance with Standard from November 28, 1981, to November 28, 1982. Then came the gap in coverage, during which Mr. Burnaby was uninsured, from November 28, 1982, to December 20, 1983, a period of more than a year. [8 C.T. 2891; 9 C.T. 3265.] The second Standard insurance contract had a policy period of December 20, 1983, to December 20, 1984. [8 C.T. 2891-2915.]

At different times, Mr. Burnaby claimed different dates of loss. To establish insurance coverage, he needed a date of loss when insurance was in effect. To pursue governmental entities without risking the bar of the statute of limitations, the date of loss would have to fall during the time of the coverage gap.

In his operative second amended complaint, without any embarrassment or explanation, Mr. Burnaby claimed that he was entitled to coverage under both of his Standard policies.[4]

In the wake of the meeting of September 19, 1983, Mr. Burnaby filed claims against the County of Los Angeles and various other governmental entities, copies of which were received in evidence at trial. [8 C.T. 2880-

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[4] There can be only one date of loss in first party claims such as that of Mr. Burnaby. *Prudential-LMI Commercial Insurance Company v. Superior Court,* 51 Cal.3d 674 (1990). Thus, the effort to place the date of loss during two separate time periods represented a legal impossibility.

2883; 9 C.T. 3116-3127.] In his claim against the County, which was dated December 16, 1983, and filed on December 19, 1983, Mr. Burnaby alleged that his house on Rock Point Way had been damaged in the amount of $1.1 million. He stated that the damage "commenced on or about September 19, 1983, is continuing to this date, and appears to be continuing into the foreseeable future." [8 C.T. 2880.] The letter listed some 18 separate acts and omissions chargeable to the County, which were claimed to have caused the landslide. [8 C.T. 2881-2882.] Claims similar to the claim against the County were filed on December 19, 1983, against the Flood Control District [9 C.T. 3116-3119], against the State of California [9 C.T. 3120-3123], and against the Coastal Commission. [9 C.T. 3124-3126.]

In his testimony at trial, Mr. Burnaby admitted that he had signed the governmental claims. He stated that they had been drafted by a neighbor, Mr. Ralph Saltzman, who was a lawyer, and represented the only way for Big Rock residents to protect themselves. He submitted the claims because he was concerned about expansion of the landslide. [3 R.T. 18-20.] He wanted to be "officially registered" as being in the Big Rock landslide. [3 R.T. 70.] Mr. Burnaby was told by Mr. Saltzman that the claims had to be submitted within 100 days of the meeting of September 19, 1983. [3 R.T. 71.] He signed the claims on December 19, 1983. [3 R.T. 126.] He thought that the cracks he had observed at his house "could have been related to [the] landslide." [3 R.T. 144.]

Mr. Burnaby admitted that he never withdrew any of his governmental claims. [3 R.T. 159.] In fact, he followed them up with a lawsuit. On June 15, 1984, Mr. Burnaby and various other homeowners filed a complaint

for damages against the County of Los Angeles and other governmental entities, entitled *Baker v. County of Los Angeles,* Los Angeles Superior Court case number WEC 87767. [10 C.T. 3685-3731.] The complaint contained allegations similar to those found in the governmental claims cited above.

As required by his insurance policies with Standard, Mr. Burnaby submitted to three separate statements under oath. His versions of the facts relating to the appropriate date of loss were not consistent. In contrast to his statements to governmental authorities, in which he needed to place the date of loss during the coverage gap, in his statements under oath and in his trial testimony, Mr. Burnaby tried to place the proper date of loss between November 28, 1981, and November 28, 1982, or at a time between December 20, 1983. and December 20, 1984.

The first statement under oath given by Mr. Burnaby was taken by attorney Jay Robinson on May 3, 1985. The entire transcript was admitted into evidence [8 C.T. 2916-2970], as were the transcripts of the later statements under oath. [8-9 C.T. 2971-9 C.T. 3115.]

In his first statement under oath, Mr. Burnaby said that, after the public meeting of September 19, 1983, he became "more aware" of his property. He began to notice cracks in a variety of places. [8 C.T. 2945.]

He also said that the cracks in his driveway were the last to appear, and that they occurred in 1984. [8 C.T. 2949.]

A second statement under oath was taken on June 9, 1987, after Mr. Burnaby had made a claim under his first Standard homeowner's policy, the one in effect from

November 28, 1981, to November 28, 1982. [8 C.T. 2971-2994.] He specifically corrected his prior statement under oath, that had been taken two years earlier, saying that he first noticed serious cracks in his driveway in 1980, rather than in 1984. [8 C.T. 2982.] He had refreshed his recollection by referring to two proposed contracts for roadway and driveway work. [8 C.T. 2983, 2993-2994.] One proposal had a price tag of $2,865.00 [8 C.T. 2993], covering repair on the Burnaby property, while the other was for work on an adjacent roadway, at a cost of $16,945.00. [8 C.T. 2994.]

The statement under oath of June 9, 1987, had to be adjourned after only a few pages of testimony, because Mr. Burnaby had failed to produce certain promised records. [8 C.T. 2986-2988.]

The third and final statement under oath was taken on November 11, 1987. [8 C.T. 2995-9 C.T. 3115.] Mr. Burnaby testified that, in 1980, he had driveway repair work done pursuant to the smaller of the two estimates that he had previously identified. [8 C.T. 2993; 9 C.T. 3050.] Additional problems then came up in late 1981, apparently during the policy period of the first Standard homeowner's insurance policy. [9 C.T. 3070.] He suspected at that time that tree roots were the problem. [9 C.T. 3070.] He was very upset, because he had spent about $3,000.00 a year and a half earlier, but now, he said, "I had my driveway cracking up again." [9 C.T. 3077.] He said that the driveway "continued to deteriorate" thereafter. [9 C.T. 3081.]

During his last statement under oath, Mr. Burnaby testified that his house was flooded in 1980, due to a broken pipe. The flood caused all of the carpets to be destroyed, and the repair cost was in the area of $8,000.00.

The carpets had to be taken up, and he noticed a crack across the dining room. [9 C.T. 3089-3091.] He said that it was some ten to twenty feet long. [9 C.T. 3092.][5]

At the third statement under oath, Mr. Burnaby produced a chronology of events which he had prepared. The chronology referred to the 1980 flood. It also referred to a "complete redo" of Mr. Burnaby's patio, at considerable expense, which was necessitated by the fact that the patio was "cracked with extreme unleveling." [9 C.T. 3113.] The redo of the patio occurred in October of 1983. [9 C.T. 3113.]

After his third and final statement under oath, but before trial, Mr. Burnaby lost interest in fixing a date of loss in late 1981 or in 1982. On May 23, 1989, the court granted Standard's motion for summary adjudication of issues, in part. [4 C.T. 1313-1316.] In particular, the court determined that any claim by Mr. Burnaby for property damage under the Standard policy in effect from November 28, 1981, to November 28, 1982, was time barred by the applicable one year contractual statute of limitations, and

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[5] This testimony about the 1980 flood was directly contrary to what Mr. Burnaby told Standard's geologist. [10 C.T. 3621-3634.] Interestingly, the information given to the geologist, that there had been no crack when carpets were taken up two years earlier was conveyed at a time that Mr. Burnaby was trying to fit his loss within a policy period extending from December 20, 1983, to December 20, 1984. Thus, it was then in his interests to claim that the crack in the slab was of recent vintage, while later he sought to have the landslide damage occur continuously, beginning prior to the inception of the policy that took effect on November 28, 1981.

that no coverage existed under that policy as a matter of law. [4 C.T. 1466-1468.][6]

At the trial of the present action, a case entirely separate from the lawsuit against the County of Los Angeles and other governmental entities, and with the possibility of coverage under the policy in effect in 1981 and 1982 eliminated, it was in Mr. Burnaby's interest to change his version of the facts from what he had stated earlier. In his opening statement to the jury, Mr. Burnaby's trial attorney revealed that some of his client's answers at the various statements under oath were "just plain wrong." [1 R.T. A266.] The answers were certainly different from Mr. Burnaby's trial testimony, which supported a date of loss in the spring of 1984. [3 R.T. 107-108.] He stated that his testimony at the third statement under oath was simply incorrect. [3 R.T. 113.]

3. The Defendant's Denial of the Burnaby Claim.

Mr. Burnaby's claim was denied in a letter dated August 7, 1985 from Mr. Jay Robinson, Standard's coverage attorney, to one of the attorneys representing Mr. Burnaby. [10 C.T. 3751-3753.] The denial was based on two essential grounds, concealment by Mr. Burnaby of information at the time that he applied for his insurance policy that took effect on December 20, 1983, and the fact that the appropriate date of loss fell during the time of the coverage gap, prior to December 20, 1983.

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[6] This ruling, with respect to the one year contractual statute of limitations, was clearly correct. *Lawrence v. Western Mutual Insurance Company,* 204 Cal.App.3d 565 (1988).

Although there was a serious conflict in the evidence concerning what Mr. Burnaby told his insurance agent at the time that he purchased the policy that took effect on December 20, 1983, Mr. Burnaby admitted at trial that he never told the agent about the governmental claims that he had filed. [3 R.T. 40.]

4. The Pleadings in the Present Case.

Mr. Burnaby filed his original complaint on September 1, 1984, but never served it. [1 C.T. 1-36.] A first amended complaint [1 C.T. 37-103], was met with a successful demurrer [1 C.T. 126-167], and, subsequently, the operative second amended complaint was filed. [1 C.T. 175-246.]

Mr. Burnaby sought recovery against Standard Fire Insurance Company, as of the time of commencement of trial, on three causes of action: breach of contract, breach of the covenant of good faith and fair dealing, and breach of fiduciary duty. [5 C.T. 1803.] During the course of trial, the court reinstated a cause of action based on alleged violation of *Insurance Code* section 790.03. [8 R.T. 1346.]

In its answer to the second amended complaint, defendant Standard Fire Insurance Company denied all of its material allegations, and asserted various affirmative defenses. [2 C.T. 713-720.]

Although much of the trial was devoted to an attempt to fix Mr. Burnaby's date of loss, there was also a lot of evidence concerning the defendant's alleged "bad faith," including expert testimony.

5. The Testimony of the Plaintiff's Insurance Expert.

The plaintiff's claim that he was entitled to extracontractual damages was based primarily on the testimony of one Richard Leabow, a purported insurance expert. [3 R.T. 209- 5 R.T. 769.] Mr. Leabow was born in 1930, and had a long, but unsuccessful, career as an insurance agent. [4 R.T. 480, 5 R.T. 722.] In fact, he was terminated by 32 of the 47 insurance companies that appointed him. [5 R.T. 722.] At the time of trial, Mr. Leabow was a professional witness, doing consulting work for attorneys, mainly plaintiff's attorneys. [3 R.T. 210.] He had previously testified 14 times in court, always for the plaintiff. [4 R.T. 414.] He charged $1,300.00 a day to testify in court. In all cases in litigation in which he had been consulted, he had found "bad faith" on the part of the insurer involved in the case. [4 R.T. 416.] Although the witness still did a little bit of consultation with respect to the purchase of insurance, his main work as of the time of trial was to be an expert for plaintiff's lawyers who had cases in litigation. [4 R.T. 418-419.]

Mr. Leabow has a bachelor's degree from U.C.L.A. with an insurance minor. [3 R.T. 211.] He is a Chartered Property Casualty Underwriter (C.P.C.U.) [3 R.T. 213], and has worked as an insurance agent. [3 R.T. 217-218.]

At one point, the trial judge said "I don't see that he has much, if any, experience on claims handling practices" [3 R.T. 260], but ruled that he could testify about previous qualifications as an expert witness in the area. [3 R.T. 264.] In every single case where he had been retained to offer an opinion concerning possible violation of *Insurance Code* section 790.03, he found that there was such a violation.

[11 R.T. 2407-2408.] He estimated that there had been about 75 cases in which he has been asked his opinion on this subject. [11 R.T. 2407-2408.] He admitted, nonetheless, that he had never made a decision to pay or to deny an insurance claim. [4 R.T. 480.]

Over objection, Mr. Leabow was allowed to express the opinion that it was improper to deny Mr. Burnaby's claim based on nondisclosure of the cracks on his property. [3 R.T. 252-253.] Over objection, he said that it was the defendant's duty to find some basis for coverage, and that any other approach is a mischaracterization of the evidence to the detriment of the insured, constituting a violation of the covenant of good faith and fair dealing. [3 R.T. 300.]

Over objection, Mr. Leabow was allowed to testify that there is a difference between a mere breach of contract and "bad faith," and that there is a duty of "utmost good faith," which is presumably higher than the duty to perform under a contract. [4 R.T. 320.] Over objection, he was permitted to testify about the Unfair Practices Act, and the reasons for it, and to express the opinion that the defendant violated it. [4 R.T. 329-332.]

Mr. Leabow stated that "to characterize him [Mr. Burnaby] as having made a 1.1 million dollars (sic) claim for earth movement damage to his property is simply to mischaracterize the evidence." [4 R.T. 472.] Over objection, he expressed the opinion that it was perfectly proper for Mr. Burnaby to apply for insurance after signing the claim letters. [4 R.T. 352-353.]

Mr. Leabow, over objection, was allowed to express the opinion that Mr. Robinson's letter denying the Burnaby claim contained misrepresentations. [11 R.T. 2389.] This opinion was based on the fact that there was a note in the

claim file contrary to what was said in the letter. [11 R.T. 2389.] Mr. Leabow admitted that it is a common practice to have insurance agents sign applications for insurance after securing the necessary information over the phone. [4 R.T. 508.]

The most interesting, and bizarre, testimony of Mr. Leabow dealt with the duty of an insurer to pay a claim. Mr. Leabow stated that an insurer may not properly deny a claim, even if the preponderance of evidence supports a finding of lack of coverage. Rather, a denial is proper only if the evidence supporting lack of coverage is "overwhelming." Otherwise, the insurer must "lean in favor of the insured." [5 R.T. 682.] In quantitative terms, a claim should be paid even if 80% of the evidence supports its denial. [5 R.T. 690.] An insurer has the duty, in Mr. Leabow's opinion, to pay a claim if there is any basis for finding the loss to be in the policy period. It is "bad faith" to look for evidence that the claim might be outside the policy period, in Mr. Leabow's view, even if that evidence ultimately proves to be correct. [4 R.T. 540.]

6. The Verdict, the Finding of "Fraud," and the Award of Punitive Damages.

The plaintiff's operative second amended complaint originally included a cause of action for alleged fraud in the sale of Mr. Burnaby's last Standard insurance policy, but this cause of action was voluntarily dropped before trial. [5 C.T. 1803.] Nonetheless, after the initial special verdict in favor of the plaintiff [7 C.T. 2647-2651], the court still submitted the issue of punitive damages to the jury with standard instructions from the *Book of Approved Jury Instructions (BAJI)*. [8 C.T. 2725-2731.] The court had

previously overruled an objection made by the defendant's attorney to the effect that the jury should not be instructed on fraud, because there was no cause of action for fraud in the case. [16 R.T. 3413.]

The jury found that the defendant was not guilty of malice or oppression, but found it guilty of "fraud." [8 C.T. 2737.] The amount of punitive damages was fixed at $500,000.00. [8 C.T. 2737.]

7. The Entry of Judgment, the Denial of Subrogation Rights, and the Appeal.

At the beginning of trial, the court ruled that it would reserve until the conclusion of trial the question of defendant's subrogation rights, if any. [1 R.T. . .0-A32.] After the verdicts of the jury, and the entry of judgment on them, the defendant filed a motion to amend the judgment to provide for the defendant's right of subrogation.

The court denied the motion to amend the judgment, reasoning that the defendant's subrogation rights were forfeited, because the jury found the defendant guilty of breach of contract as well as conduct permitting the award of extracontractual damages. [8 C.T. 2746.]

In connection with Standard's motion for a new trial, the plaintiff consented to a reduction in the amount of extracontractual compensatory damages from $600,000.00 to $200,000.00. [8 C.T. 2747-2749.] In accordance with the jury's verdicts, and the plaintiff's consent to a reduction in damages, judgment was entered. [8 C.T. 2750-2752.] From the judgment and from the order denying subrogation rights, the defendant timely appealed. [8 C.T. 2753-2755.]

8. The Request for Judicial Notice.

During the course of the appeal, the defendant Standard Fire Insurance Company filed in the Court of Appeal a request for judicial notice of court documents pertaining to *Baker v. County of Los Angeles,* the case brought by Mr. Burnaby and others for landslide damage to their houses, as noted above.

These documents show that Mr. Burnaby and other Big Rock homeowners received some $97 million in settlements, although no public record could be found of the precise amount received by Mr. Burnaby individually. Although there was no formal order concerning the request for judicial notice, the Court of Appeal implicitly granted the request, by citing certain facts not found elsewhere in the record.

9. The Opinion of the Court of Appeal.

On June 1, 1993, the Court of Appeal filed its opinion, certified for publication, affirming the judgment of the trial court in its entirety. A copy of the slip opinion is attached hereto as exhibit A.

On June 16, 1993, the defendant filed a petition for rehearing, pointing out some of the serious flaws in the Court of Appeal opinion. Nine specific factual misstatements were noted, along with even more serious omissions.[7] The failure of the court to consider important legal issues was also mentioned.

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[7] Some of the more serious factual misstatements and omissions on the part of the Court of Appeal will be discussed below, in the portion of this petition devoted to legal argument.

In response to the petition for rehearing, the plaintiff filed a brief entitled "request for minor modifications to court's opinion and opposition to petition to rehearing." The plaintiff was apparently worried about some of the errors made by the Court of Appeal, and believed that they could be corrected.

On June 30, 1993, as noted in exhibits B and C to this petition, the Court of Appeal denied both the defendant's petition for rehearing and the plaintiff's request for modification of its opinion.

10. The Urgent Need for Review.

Review should be granted in order to provide guidance to the insurance industry in the area of claims handling, and to the lower courts in the area of adjudicating insurance disputes. The history of the present lawsuit shows that the legal duties of insurers are not clearly defined. Moreover, to the extent that those duties were defined for the trier of fact, the task was accomplished mainly by an expert witness who was not even a lawyer.

A second reason for granting review is to correct a million dollar mistake by a jury, representing a substantial injustice to the defendant. The plaintiff was permitted to advance several inconsistent versions of the facts, and achieve double recovery for his claimed loss. The law should not permit him to do so, and the contractual and equitable subrogation rights of the defendant should be recognized. It is manifestly improper to permit a half million dollar award of punitive damages on the basis of a "fraud" finding, when no claim of fraud was ever properly before the trier of fact.

The third reason why review is essential is to avoid the serious adverse effects that will ensue if the Court of Appeal decision remains published. Uninsured property owners would be encouraged to go and buy insurance even after they know about progressive property damage that they are suffering. Plaintiffs would be encouraged to take different factual positions in different lawsuits, because such conduct would be legally acceptable. The use of expert witnesses telling juries about the law would greatly expand. Double recovery would be encouraged. An entirely new type of punitive damages claim would develop, burdening the courts and punishing defendants for the mere denial of liability, all based on an erroneous interpretation of *Civil Code* section 3294(c)(3).

To do justice and to settle important issues of law, review by this court is essential.

ARGUMENT

I.

In Light of His Statements and Conduct, the Plaintiff Is Estopped to Claim a Date of Loss of His House Within the Effective Dates of the Defendant's Insurance Policy, and He Therefore Has No Coverage Under It.

The problem of determining the date of loss in cases of continuous and progressive property damage has beguiled property owners, insurers, and the courts. Mr. Burnaby's case is unusual in that a property owner has, in various statements and in two separate lawsuits, attempted to fix the date of loss during three separate time spans. As things now stand, he has been successful as to two of them. He should

be held to be estopped from claiming two different dates of loss, according to his interests in different cases.

In *Abari v. State Farm Fire & Casualty Company,* 205 Cal.App.3d 530 (1988), the Court of Appeal considered the question of accrual of a property damage claim under a homeowner's insurance policy for subsidence damage to a house. The trial court sustained the defendant insurer's demurrer without leave to amend, holding that, as a matter of law, the homeowner's observation of cracks inside his house and in his driveway was sufficient to put him on notice. The Court of Appeal affirmed, rejecting the argument, made for the first time on appeal, that the cracks may have been so small that no reasonable person would be put on notice of a subsidence problem. 205 Cal.App.3d at 535. The *Abari* court noted the general rule that a cause of action of the type before it accrues when the plaintiff discovers or should have discovered all facts essential to his cause of action. 205 Cal.App.3d at 535. Since the plaintiff in *Abari* failed to bring an action within a year of his discovery of the cracks in question, his claim against his homeowner's insurer was held time barred, under the one year contractual statute of limitations found in the insurance policy in question. 205 Cal.App.3d at 536.

Citing *Abari* and other authorities, this court, in *Prudential-LMI Commercial Insurance v. Superior Court,* 51 Cal.3d 674 (1990), ruled that, for purposes of determining coverage, the inception of a loss should be "determined by reference to reasonable discovery of the loss and not necessarily turn on the occurrence of the physical event causing the loss." 51 Cal.3d at 686. Specifically, the "inception of the loss" is "that point in time at which appreciable damage occurs so that a reasonable insured

would be put on notice of a potentially insured loss." 51 Cal.3d at 685.

Prudential-LMI involved damage to an apartment building caused by earth movement, which damage occurred over time, and was first manifested by an "extensive crack in the foundation and floor slab of the building." 51 Cal.3d at 680-681. The court defined the date of loss as noted above, and concluded that, in first party progressive property loss cases, "where the loss occurs over several policy periods, the date of manifestation determines coverage," and until there is manifestation, "the insured has not suffered a compensable loss." 51 Cal.3d at 699. Once the loss is manifested, however, there is no longer a contingent risk, and insurers whose policy periods commence after the initial manifestation of the loss are not responsible for any potential claim relating to the "previously discovered and manifested loss." 51 Cal.3d at 699.

The court in *Prudential-LMI,* in defining the date of loss as "that point in time when appreciable damage occurs and is or should be known to the insured, such that a reasonable insured would be aware that his notification duty under the policy has been triggered," stated that "the insured is required to be diligent in the face of discovered facts." 51 Cal.3d at 687. Moreover, "[t]he more substantial or unusual the nature of the damage discovered by the insured (e.g., the greater its deviation from what a reasonable person would consider normal wear and tear), the greater the insured's duty to notify his insurer of the loss promptly and diligently." 51 Cal.3d at 687.

Government Code section 911.2 provides that "[a] claim relating to a cause of action for death or for injury to person or to property . . . shall be presented . . . not later

than six months after the accrual of the cause of action." *Government Code* section 910 has detailed requirements specifying the contents of a claim, including a description of the damage or loss incurred so far as it may be known at the time of presentation of the claim.

In 1983, *Government Code* section 911.2 allowed only 100 days from the accrual of a cause of action to file a claim. When Mr. Burnaby filed his claim on December 19, 1983, asserting a date of loss of September 19, 1983, he complied with this statute. As the Court of Appeal noted in its opinion, Mr. Burnaby and other homeowners successfully prosecuted their lawsuit against the County of Los Angeles and other governmental entities, relying on the integrity of the September 19, 1983 date of loss claimed by Mr. Burnaby and others.

It is improper for Mr. Burnaby to contend that his house was lost on one date, for purposes of pursuing a claim against the County of Los Angeles, while claiming a different date for insurance coverage purposes. Although a plaintiff may plead inconsistent theories of recovery, he may not "blow hot and cold" as to the facts, particularly those facts which are within his knowledge and are positively stated. *Manti v. Gunari,* 5 Cal.App.3d 442, 449-450 (1970); *Drake v. Morris Plan Company,* 53 Cal.App.3d 208, 210-211 (1975); *Tovar v. Southern California Edison Company,* 201 Cal.App.3d 606, 613 (1988).

In *Gray v. Reeves,* 76 Cal.App.3d 567 (1977), the Court of Appeal reviewed a summary judgment in a medical malpractice action in favor of the defendants, that was based on the statute of limitations and a factual showing derived from the plaintiff's own deposition testimony. When the defendants moved for summary judgment, the

plaintiff opposed the motion with a declaration retracting his deposition testimony, thereby creating a triable issue of fact, according to the plaintiff. Nonetheless, the trial court granted that summary judgment, disregarding the attempt to retract sworn testimony, and the Court of Appeal affirmed. The court reasoned that "the credibility of the admissions" of the plaintiff is "so highly regarded that contradicting affidavits may be disregarded as irrelevant, inadmissible or evasive." 76 Cal.App.3d at 573. The same rule has been stated in various other cases, including *Leasman v. Beech Aircraft Corporation,* 48 Cal.App.3d 376 (1975), *Nunez v. R'Bibo,* 211 Cal.App.3d 559 (1989), and *Sandoval v. Mercury Insurance Group,* 229 Cal.App.3d 1 (1991).

Unlike the plaintiff in the *Gray* case, who was held to be estopped to change his deposition testimony, the Court of Appeal here allowed Mr. Burnaby to get away with inconsistent positions at different times in different lawsuits. It does not even mention the *Gray* decision, although it was cited in the appellant's opening brief. In fact, the whole question of estoppel is dismissed by the Court of Appeal by the comment that "Burnaby presented a reasonable and plausible explanation to the jury" for his varying versions of the truth. (Opinion, page 11.)

In *Aerojet-General Corporation v. Superior Court,* 211 Cal.App.3d 216 (1989), the Court of Appeal considered a petition for rehearing, in which the losing parties appeared to shift their position. Rehearing was denied, the court stating that "[o]ne may not alter one's appellate argument as the chameleon does his color, to suit whatever terrain one inhabits at the moment." 211 Cal.App.3d at 240.

Perhaps the most thorough analysis of estoppel in the present context can be found in the comment entitled

"Precluding Inconsistent Statements: The Doctrine of Judicial Estoppel" 80 Nw. U.L. Rev. 1244 (1986), by Rand C. Boyers. According to Mr. Boyers, "the doctrine of judicial estoppel prevents a party asserting a position in a legal proceeding that is contrary to a position previously taken by him in the same or some earlier legal proceeding." (Footnotes omitted.) 80 Nw. U.L. Rev. 1244.

A prototypical example of judicial estoppel, analyzed by Mr. Boyers in his comment, can be found in the case of *Finley v. Kesling,* 105 Ill.App.3d 1, 433 N.E.2d 1112 (1982). The plaintiff in the case, Mr. Charles O. Finley, the owner of the Oakland Athletics baseball team at the time, had testified in a 1974 Indiana divorce action, under oath, that he owned 31% of the stock of his corporation, while his wife owned 29%, and his children 40%. The Indiana court accepted this testimony, and therefore did not include the 40% share of the children in dividing the property of Mr. Finley and his wife. Later, in an Illinois lawsuit, Mr. Finley asserted that he was actually the beneficial owner of the stock he had previously testified belonged to his children. The Illinois courts held that Mr. Finley was estopped to so contend, having given contrary testimony in the earlier domestic litigation. 105 Ill.App.3d at 10, 433 N.E.2d at 1119.

It is respectfully submitted that the same rule of law that was applied to Mr. Charles O. Finley should be applied to Mr. Frank Burnaby. The present plaintiff should not be permitted to sue, successfully the County of Los Angeles and other governmental entities in an action where the validity of his claim depended on a September 19, 1983 date of loss of his property, and still maintain the present lawsuit, based on the contention that the true date of loss

was during the spring of 1984. Although the *Northwestern Law Review* comment by Mr. Boyers does not cite any California cases, the principles discussed appear to be the same as those long followed by California courts. Although the Court of Appeal in *Gray v. Reeves,* 76 Cal.App.3d 567 (1977), did not expressly rely on estoppel, it did so by implication. The *Gray* court held that a plaintiff could not, as a matter of law, change deposition testimony in order to avoid the statute of limitations. The plaintiff in the present case, in contrast, has been permitted, thus far at least, to change his testimony with respect to the date of loss of his house, so as to bring it within the policy period of an insurance policy that he bought after he was already aware of the Big Rock Mesa landslide.

In his response to the petition for rehearing in this case, Mr. Burnaby actually proposed that the Court of Appeal opinion be modified so as to indicate that he "had been advised to file a claim as soon as the landslide was announced, to avoid any possibility of a statute of limitations bar to a later suit for damages." (Page 7.) He apparently believes, even now, that there is nothing wrong with claiming different facts, according to one's interests. The courts, however, view truth as unitary, not something to be changed when convenient.

If Mr. Burnaby is held to the date of loss stated in his governmental claims, and in his lawsuit against governmental entities, he will have no coverage. If Mr. Burnaby has no coverage under the Standard policy that took effect on December 20, 1983, he has no right to extracontractual general damages or to punitive damages. *Abari v. State Farm Fire & Casualty Company,* 205 Cal.App.3d 530, 536 (1988). Thus, a decision by this court that Mr. Burnaby is

bound by the facts stated by him under oath and in his governmental claims would be sufficient to resolve the entire litigation, mandating entry of judgment in favor of the defendant.

The jury in the present case was told that it is all right to tamper with the truth, as long as the result is finding coverage. The person who so instructed the jury was Mr. Richard Leabow, a purported expert witness, whose testimony recasts the law to the benefit of the plaintiff.

II.

No Expert Witness May Properly Instruct a Jury About the Law or, Even Worse, Do So Erroneously, and the Trial Court Erred Prejudicially in Allowing Such Testimony.

The testimony of Mr. Richard Leabow, only the highlights of which are cited in this petition, was incredible. In the guise of expert testimony, Mr. Leabow instructed the jury on the law, both substantive law and how to determine the facts. In spite of objections, Mr. Leabow rambled on and on, discussing numerous subjects. His area of expertise, if any, was never specifically defined.

The law places limits on the permissible scope of expert testimony. Whether a person qualifies as an expert in a particular case depends on the facts of the case and the qualifications of the witness. The competency of the expert relates to the topics and fields of knowledge about which the person is asked to testify. In considering whether a person qualifies as an expert, the field of alleged expertise must be carefully distinguished and limited. *People v. Kelly,*

17 Cal.3d 24, 39 (1976). See also, *People v. Chavez,* 39 Cal.3d 823 (1985). If a purported expert witness offers testimony beyond the scope of his expertise, that testimony should be excluded. *Putensen v. Clay Adams, Inc.,* 12 Cal.App.3d 1062, 1080-1081 (1970); *Finn v. G.D. Searle & Company,* 35 Cal.3d 691, 703-704 (1984).

Assuming that Mr. Leabow was qualified to testify about something, he should never have been allowed to offer opinions on proper claims handling. He admitted that he had never been involved in the decision to pay or deny a claim. Only once before, in a reported California case, has an appellate court considered testimony similar to that offered by Mr. Leabow, although the court reached a conclusion very different from that of the Court of Appeal in the present case.

In *California Shoppers, Inc. v. Royal Globe Insurance Company,* 175 Cal.App.3d 1 (1985), the Court of Appeal reviewed a judgment that was entered in a "bad faith" case. The court found it erroneous to admit evidence of the type that was admitted in the present case. The court analyzed the testimony of one purported expert, as follows:

> "Attorney Wylie A. Aitkin was allowed to testify as a so-called expert on the subject of insurance company practices, the purpose of such testimony obviously having been designed to show that Royal Globe had not only breached the implied covenant of good faith and fair dealing, but had also gone further and behaved or failed to behave in such a way as to make it answerable in exemplary damages.

"In other words, Aitkin's testimony was essentially that everything Royal Globe did with reference to California Shoppers was wrong. He was permitted to refer to California Shoppers' exhibit 19 (not placed in evidence), a chart prepared by Mr. Hafif, one of the attorneys for California Shoppers, and represented to be 'statements of good insurance practices.' Over objections by defense counsel, the court permitted the chart to be used before the jury to `illustrate' Aitkin's testimony. The chart itself was highly prejudicial because it set forth selected excerpts of legal propositions in a misleading manner. *Aitkin's testimony contained some accurate statements of law, some incomplete statements of law, and some palpably erroneous statements of law. Whatever, almost all of this testimony was wholly incompetent.*

"The crux of the error here was that Aitkin in no sense was qualified as an expert to testify about the subject on which he purported to testify. There is no question both on the record and as a matter of repute at the bar, but that he is a highly qualified trial attorney, and a particularly aggressive advocate of plaintiffs' cases against insurance companies. However, no foundation whatsoever was laid to demonstrate that Aitkin had any special knowledge, skill, experience, training or education such as would qualify him as an expert on *insurance company*

> *practices.* It is no answer, that certain of his professional efforts are aimed at discovering insurance company derelictions of duty, and then taking them to task. An objection was made to his giving opinions on how California Shoppers' claim was handled.
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> "Indeed, as Aitkin candidly admitted, he had never been employed nor even retained as counsel by an insurance company. Small wonder.
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> "It is well settled that an expert's qualifications must be established with respect to the subject matter of his testimony. The fact that the purported expert may be qualified in one field vaguely related to another does not mean that he is qualified in that other field." (Emphasis added in part.) 175 Cal.App.3d at 66-67.

In contrast, the Court of Appeal in the present case upheld the admission of the testimony of Mr. Leabow, although he was certainly less qualified to offer legal opinions than attorney Wylie A. Aitkin. Although the *California Shoppers* case was prominently cited by the appellant in its opening brief, it was not even mentioned, much less distinguished, by the Court of Appeal in its cursory analysis of the admission, over objection, of Mr. Leabow's testimony.

The most disturbing aspect of Mr. Leabow's appearance on the witness stand was his discussion of the law. The trial court permitted, and the Court of Appeal has now approved the practice of allowing an expert to instruct a

jury on the requirements of the law, notwithstanding earlier contrary authority.

Up to now, the law has been that an expert witness may not interpret the law, provide an interpretation of a statute, or give opinions concerning legal questions that are within the province of the court. *Elder v. Pacific Telephone & Telegraph Company,* 66 Cal.App.3d 650, 664 (1977); *Communications Satellite Corporation v. Franchise Tax Board,* 156 Cal.App.3d 726, 747 (1984); *Sheldon Appel Company v. Albert & Oliker,* 47 Cal.3d 863, 884 (1989).

In *Downer v. Bramet,* 152 Cal.App.3d 837 (1984), the Court of Appeal reviewed a trial court ruling prohibiting an attorney expert witness from offering legal conclusions in the guise of expert testimony. The refusal of the trial court to allow such testimony was upheld, because "the calling of lawyers as 'expert witnesses' to give opinions as to the application of the law to particular facts usurps the duty of the trial court to instruct the jury on the law as applicable to the facts, and results in no more than a modern day 'trial by oath' in which the side producing the greater number of lawyers able to opine in their favor wins." 152 Cal.App.3d at 842. Expert testimony should be "limited to those areas in which the subject is sufficiently beyond common experience that an expert opinion would assist the trier of fact." 152 Cal.App.3d at 842.

Unlike the proposed expert in *Downer*, Mr. Leabow was not even a lawyer. Nonetheless, he was permitted to testify as to the requirements of the law, and he did so erroneously. Although the jury was elsewhere instructed that factual issues should be decided by a preponderance of the evidence, a 50% plus standard of proof, Mr. Leabow erroneously told the jury that an insurance company, in

considering a contract claim, could not weigh the evidence by such a standard. This testimony, considered in the light of all the erroneous testimony concerning fiduciary obligations and statutory obligations, was highly misleading. The validity of all civil claims is measured by the preponderance of the evidence standard, and this basic rule of the legal system cannot be altered by the testimony of any purported expert. If a purported expert seeks to change the law, and provide standards of conduct different from those established by law, such expert testimony must be disregarded. *Day v. Rosenthal,* 170 Cal.App.3d 1125, 1147 (1985).

In upholding the propriety of Mr. Leabow's testimony, the Court of Appeal quotes only a small part of it. It appears to hold that, since the quoted testimony was elicited on cross examination, the defendant has no right to object to it on appeal. However, the law is well established that a party does not, by cross examining a witness, waive the right to challenge the testimony of that witness on appeal. *Moore v. Norwood,* 41 Cal.App.2d 359, 368-369 (1940); *People v. Sam,* 71 Cal.2d 194, 207 (1969).

When the time came to cross examine Mr. Leabow, the trial judge had already ruled in favor of his competency as an expert witness, and had overruled numerous objections. The defendant's attorney, therefore, had no choice but to find out the basis for Mr. Leabow's bizarre views, which he had already explained to the jury in great detail, telling the jury about both the law and the facts. Defendant never waived the right to challenge the legal propriety of Mr. Leabow's testimony, any more than the defendant did so in the *California Shoppers* case, which is discussed above. A witness such as Richard Leabow or Wylie Aitkin, having

never participated in the decision to pay or deny an insurance claim, should not be permitted to testify at all concerning insurance company practices.

Mr. Leabow's improper testimony undoubtedly influenced the jury's fact finding, as to all causes of action. The jury was told that an insurer must pay a claim, even where the great weight of the evidence supports its denial. From such an erroneous premise, it is easy to find that the defendant is guilty of not only breach of contract, but statutory violations, common law bad faith, and breach of fiduciary duty, whether or not any evidence of such liabilities exists. Based on the testimony of Mr. Leabow, the jury awarded extracontractual damages, but there was no evidence that supported any such award.

III.

An Award of Extracontractual Damages Against an Insurer for Denial of a Claim Cannot Stand Unless Reasonable Minds Cannot Disagree About a Finding That the Denial Was Unreasonable and Without Proper Cause, and No Such Finding Is Possible Where the Insurer Has Based Its Denial of a Claim on Information From the Insured Himself.

Although the Court of Appeal found the evidence sufficient to support the jury's findings concerning extracontractual liability in this case, it did not bother to consider any of the authorities cited by the defendant on the subject. In fact, it did not cite any authority whatsoever. Had it done so, the Court of Appeal would have been required to analyze different evidence, and it would have

found that the denial of Mr. Burnaby's claim was reasonable as a matter of law.

Extracontractual tort liability, with respect to first party insurance, was first recognized by this court in *Gruenberg v. Aetna Insurance Company,* 9 Cal.3d 566 (1973). Such liability may exist only where an insurer fails to deal fairly and in good faith with its insured, "by refusing, without proper cause, to compensate its insured for a loss covered by the policy." 9 Cal.3d at 574. For such liability to exist, the insurer must have acted "unreasonably." 9 Cal.3d at 573. See also, *Neal v. Farmers Insurance Exchange,* 21 Cal.3d 910, 920 (1978).

Not every denial of a claim gives the claimant the right to recover extracontractual damages. Rather, only "when the insurer unreasonably and in bad faith withholds payment of the claim of its insured," is it "subject to liability in tort." *Gruenberg v. Aetna Insurance Company,* 9 Cal.3d 566, 575 (1973). The test of good faith or bad faith is one of reasonableness. *McCormick v. Sentinel Life Insurance Company,* 153 Cal.App.3d 1030, 1042 (1984). An insurer is subject to liability for "bad faith" only if it has denied a claim "without proper cause." *Brandt v. Superior Court,* 37 Cal.3d 813, 817 (1985). See also, *Pacific Southern Mortgage Trust Company v. Insurance Company of North America,* 166 Cal.App.3d 703, 715 (1985), and *Gourley v. State Farm Mutual Automobile Insurance Company,* 53 Cal.3d 121, 127-128 (1991).

A recent incisive analysis of the law of first party "bad faith" appears in an article entitled "Good Faith as a Matter of Law, the Insurance Company's Right to Be Wrong," by Douglas G. Houser, appearing in the Spring, 1992, issue of the *Tort and Insurance Law Journal,* a

publication of the Tort and Insurance Practice Section of the American Bar Association. Mr. Houser describes the rise of "bad faith" law as follows:

> "One of the biggest concerns insurance companies (and insurance company executives) face is the dramatic rise in potential liability for extracontractual damages for 'bad faith' in first-party claims. Many courts have recognized the misuse and abuse by claimants and overly aggressive plaintiffs' lawyers who frequently make unfounded 'boilerplate' allegations of 'bad faith' in virtually every first-party claim related to a coverage or claims handling dispute. Plaintiffs' advocates alleging 'bad faith' against insurers for the alleged mishandling of their insureds' claims result in jury verdicts and 'blood money' settlements that probably cost insurance companies and the insurance-buying public hundreds of millions of dollars each year.
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> "The tort of first party bad-faith is usually said to have originated in California in 1968 and is sometimes referred to as the 'second California gold rush.'" (Footnotes omitted.) 27 Tort & Ins. L.J., at 665-666.

Although noting that the definition of "bad faith" varies from state to state, the author indicates that many jurisdictions have adopted a test, as he describes:

> "The two-part test for first-party bad faith is followed by many jurisdictions. Under this test, 'bad faith' claimants have the burden to

prove: (1) that the insurer's conduct was both unreasonable and (2) that the insurer intentionally denied a claim or delayed payment of a claim that the insurance company knew to be valid or showed a reckless disregard of the fact that a valid claim had been submitted.

"Courts uniformly reject a strict liability standard for bad faith claims, and most have held that negligence alone is insufficient to trigger liability of an insurer for the tort of bad faith. Therefore, to satisfy the 'fairly debatable' test, the plaintiff must 'go beyond a mere showing of nonpayment and prove a bad faith nonpayment, a nonpayment without any reasonable ground for dispute.' In other words, bad faith requires the showing of a 'frivolous or unfounded refusal to pay.'

"Under the reasonableness inquiry, courts must determine whether a reasonable insurer under the particular facts and circumstances would have denied or delayed payment of the claim. The absence of a legitimate, arguable, or fairly debatable reason for denial of coverage is one of the ultimate material facts upon which the insured claimant has the burden of proof. As long as the insurer has a reasonable basis for denying or delaying payment, the insurer should not be liable for bad faith. This is a simple matter of fairness. All persons, including insurance

> companies, should have the right to their day in court. The price of losing a trial should not be millions of dollars in punitive damages." (Footnotes omitted.) 27 Tort & Ins. L.J. at 667.

This test appears consistent with the definition of insurer tort liability found in the *Gruenberg* case, as cited above. The logical consequence of the two part test stated above is that, if reasonable minds can differ concerning the validity of a claim, there is no bad faith, as a matter of law. As Mr. Houser explains:

> "If an insurer can produce sufficient evidence to create a jury issue on the question of coverage, then there is clearly a 'fairly debatable' coverage question, and a court should dismiss any accompanying bad faith claim. A jury may ultimately determine that the insurance company was wrong on the issue of coverage, but the jury should not be permitted to consider imposition of extracontractual bad faith damages as a consequence of the company's challenge to the fairly debatable claim. '[W]here a claim is fairly debatable, the insurer is entitled to debate it and there is no bad faith on its part in doing so.'" (Footnotes omitted.) 27 Tort & Ins. Law Journal at 668.

After analyzing the theoretical problems with first party bad faith, Mr. Houser discusses what he describes as the "*Dutton* rule," established by the leading case of *National Savings Life Insurance Company v. Dutton,* 419 So.2d 1357 (Ala. 1982). Simply stated, the *Dutton* rule is

that "if the evidence produced by either side creates a fact issue with regard to the validity of the claim and, thus, the legitimacy of the denial thereof, the tort claim must fail and should not be submitted to the jury." 27 Tort & Ins. L.J. at 669. In other words, as a matter of law, "[a] bad faith claim should not be successful unless reasonable minds could not disagree about the insured's right to collect under the policy, and the court is prepared to enter a directed verdict for the claimant on an insurance contract claim." 27 Tort & Ins. L.J. at 669. According to Mr. Houser, the *Dutton* rule has been followed or applied in 36 states, including California, and rejected in only three states. 27 Tort & Ins. L.J. at 669 and 674.

The author's ultimate conclusion with respect to the law of first party "bad faith" is as follows:

> "By recognizing an insurance company's right to challenge debatable claims, the great majority of the American courts help balance the scales of justice between a claimant's right to recover on a policy when a claim is intentionally and wrongfully denied and the insurance company's right to question arguable claims. Recognizing good faith as a matter of law is the long-term interest of premium-paying insureds and the financial predictability and stability of insurance companies. And the national trend is clearly to recognize this standard. Insurance companies have a good faith right to be wrong!" 27 Tort & Ins. L.J. at 673.

Certainly, if an insurer ever has the right to be wrong, such right existed in the present case. Mr. Burnaby

stated in writing, before the issuance of the defendant's insurance policy, that his house was a total loss, specifying a date of loss of September 19, 1983. Even if it is legally proper for him to disown this date of loss, it was certainly not unreasonable for the defendant to rely on it. Moreover, Mr. Burnaby gave statements under oath, in which he provided specific factual information that supported a conclusion that the proper date of loss of Mr. Burnaby's house long predated the inception of the defendant's insurance policy on December 20, 1983. Although, at trial, Mr. Burnaby retracted his prior sworn testimony, it certainly cannot be bad faith for Mr. Burnaby's insurer to have relied on it in denying his claim.

In *Austero v. National Casualty Company,* 84 Cal.App.3d 1 (1978),[8] the Court of Appeal reversed the extracontractual part of a judgment, in a first party "bad faith" case. It held that, although the defendant improperly denied a claim, its conduct was reasonable, as a matter of law. 84 Cal.App.3d at 35-36. In particular, the handling of the plaintiff's claim "was eminently reasonable and did take into account equally and fairly both the interests of the insured and the insurer." 84 Cal.App.3d at 35-36. Since "the ultimate test of liability in the first party cases is whether the refusal to pay policy benefits was *unreasonable* (emphasis in original)," the insurer could not be held liable for any extracontractual damages. 84 Cal.App.3d at 32.

In recognizing the right of an insurer to deny a claim where there was conflicting evidence with respect to the facts determining coverage, the *Austero* court noted that

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[8] *Austero* was disapproved on other grounds in *Egan v. Mutual of Omaha Insurance Company,* 24 Cal.3d 809 (1979).

an insurer must be given some latitude, and may consider its own interests, as well as the interests of the insured. The court made the following observation:

> "[A]n insurer is not required to pay every claim presented to it. Besides the duty to deal fairly with the insured, the insurer also has a duty to its other policyholders and to the stockholders (if it is such a company) not to dissipate its reserves through the payment of meritless claims. Such a practice inevitably would prejudice the insurance seeking public because of the necessity to increase rates, and would finally drive the insurer out of business. Indeed, analysis of the leading first party cases demonstrates that a rule has never been applied which holds under any circumstances that an insurer which refuses to pay benefits claimed to be due under the policy did so at its own risk. Clearly, both logic and good policy dictate that no such rule ever be applied in first party cases." 84 Cal.App.3d at 30.

In deciding whether the handling of a particular claim was "unreasonable," the conduct of an insurer "must be measured as of the time it was confronted with a factual situation to which it was called upon to respond." 84 Cal.App.3d at 32. It is "essential that no hindsight test be applied." 84 Cal.App.3d at 32.

After the *Austero* court reviewed the substantial conflicting evidence with respect to the plaintiff's medical condition, it found that it was not even presented with a "close" case. 84 Cal.App.3d at 35. Rather, there was ample

evidence justifying the company's conduct, even if there was also conflicting evidence. In such a situation, the claims handling was reasonable as a matter of law. 84 Cal.App.3d at 35.

Another illustrative case is *Opsal v. United Services Automobile Association,* 2 Cal.App.4th 1197 (1991).[9] Like the present case, *Opsal* involved damage to a single family residence caused by earth movement. The insurer denied a claim under its homeowner's policy, and the homeowner sued for breach of contract, "bad faith," and fraud. 2 Cal.App.4th at 1201. The jury found in favor of plaintiff Opsal, awarding the policy limits of $52,000.00, $17,550.00 in attorney's fees, and 1.7 million dollars in punitive damages. 2 Cal.App.4th at 1201. The Court of Appeal upheld the contract damages, but took away all of the rest.

The *Opsal* court observed that "[i]t is now clear under California law that an insurer's erroneous failure to pay benefits under a policy does not necessarily constitute bad faith entitling the insured to recover tort damages." 2 Cal.App.4th at 1205. There can be no bad faith liability, as

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[9] The *Opsal* case was originally decided on June 13, 1991, and reported at 231 Cal.App.3d 1530. On October 3, 1991, this court granted review, assigning case number S022097, thereby vacating the Court of Appeal opinion. Apparently, the court granted review in *Opsal because the case involved,* among other things, an issue that was also presented by *State Farm Fire & Casualty Company v. Von Der Leith,* 54 Cal.3d 1123 (1991), which was pending in the Supreme Court as of October 3, 1991, but not yet decided. The *Opsal* decision was reprinted without change at 2 Cal.App.4th 1197, in order to permit tracking pending review. Review was dismissed on March 19, 1992, and the cause remanded to the Court of Appeal. On July 9, 1992, this court ordered *Opsal* to be published.

a matter of law, if there is a genuine issue as to the insurer's liability. 2 Cal.App.4th at 1205-1206.

The Court of Appeal in *Opsal* found that the defendant's reliance on certain policy language in its denial of the plaintiff's claim was erroneous, but there was a genuine issue with respect to the validity of the insurer's position until the law was clarified. Hence, the trial court was directed to enter judgment in favor of the insurer as to all damages except those representing breach of contract. 2 Cal.App.4th at 1207.

If the Court of Appeal had reviewed any of the above authorities, it would have discovered the correct legal standard, and would have analyzed the record differently. As it was, the court appears to have derived much of its statement of facts from the respondent's brief, rather than from a careful review of the record. Among the factual errors of the Court of Appeal is the following:

> "Uncontroverted testimony was presented to the jury by an expert witness that the landslide manifested itself in the area of Burnaby's home in 1984 and that the cracks in the driveway were probably caused by tree roots." (Pages 10-11.)

This statement is untrue. The plaintiff's own geological expert, Dr. Awtar Singh, testified that he believed that the cracking in Mr. Burnaby's driveway was caused by earth movement. [2 R.T. A389.] Moreover, Dr. Singh also testified that earth movement may take place without anyone knowing it. [2 R.T. A386.] He stated that there were no survey monuments in the western area of the Big Rock Mesa until 1984, and that, as a result, there is no way to

know if earth movement took place prior to that year. [2 R.T. A388.]

In light of Dr. Singh's clear testimony, it is uncontrovertible that the passage from the court's opinion quoted above is mistaken. What the court has said is not supported by the record. Indeed, the record contradicts the court's statement of fact.

Unfortunately, the Court of Appeal simply did not understand what evidence is relevant to the question of whether the denial of a claim is reasonable. Section VII of the Court of Appeal opinion (pages 24-27) purports to summarize the "substantial evidence" justifying extracontractual damages. This portion of the opinion is not only factually inaccurate, but misses the point. The court discusses evidence that may tend to show that Mr. Burnaby's claim, as presented at trial, was valid. In contrast, the question of reasonableness of the denial of a claim must rest on the evidence on which the insurer relied in making the decision to deny the claim.

One ground for denial of the Burnaby claim was concealment of information on his insurance application. Admittedly, there was some conflict in the evidence concerning the various conversations that took place between Mr. Burnaby and his insurance agent. Nonetheless, it was quite reasonable for the insurer to rely on the information that it received, even though a jury, years later, believed contrary evidence. Even Mr. Burnaby admitted that he never told his agent about his written governmental claims, in which he stated that his house had been totally destroyed. Assuming that this omission on the part of Mr. Burnaby does not represent concealment as a matter of law, within the meaning of *Insurance Code* section 332, so as to

nullify Mr. Burnaby's insurance policy, it certainly represents enough evidence for the insurer to reasonable take the position that there was concealment.

The Court of Appeal also relies on the conclusion that it was "bad faith" for the defendant not to have consulted with a geologist employed by the County of Los Angeles, Mr. Dennis Evans. However, the uncontradicted evidence is that the defendant's coverage attorney, Mr. Jay Robinson, did not contact Mr. Evans because he believed that Mr. Evans "was someone else's expert witness," and that it would have been a "violation of the canons of ethics" for him to have contacted an expert witness hired by an adverse party in litigation. [11 R.T. 2358:7-11.] Even assuming it was negligent of Mr. Robinson to entertain this belief, it was certainly not bad faith for him and his client to have acted on it.

The Court of Appeal relies on certain tidbits of evidence from the defendant's claim file, indicating uncertainty about the date of loss for the Burnaby claim. There were also differences of opinion, reflected in the claim file, about the merits of the claim. This evidence, however, does not support a finding of bad faith. The test of bad faith is not incorrect resolution of conflicting evidence, but whether the ultimate decision of an insurer to deny a claim was reasonable.

The Court of Appeal refers to expert opinions concerning Mr. Evans, but fails to mention that the hypothetical facts on which those opinions were based, such as knowledge of the alleged availability of Mr. Evans to the defendant, were never established.

The Court of Appeal states that a claimsman "sent a notice to his superior, George Spilios, the claims depart-

ment manager, showing Burnaby's loss date as December 20, 1983, but sent a letter one week later to Burnaby's attorney indicating the company was of the opinion that the loss date was September 10, 1983, a date outside of the insurance policy period." (Opinion, page 27.) However, if the Court of Appeal had studied the record more carefully, it would have understood the significance of internal documents specifying the date of loss as December 20, 1983. An insurer may not properly establish a claim file, unless it can, at least tentatively, set a date of loss within the relevant policy period. Otherwise, coverage is not even theoretically possible. The date of December 20, 1983, was the earliest date on which the relevant insurance policy was in effect. Its use for internal purposes did not represent a company determination of its validity, and no such determination was ever communicated to Mr. Burnaby. [9 R.T. 1776-1777; 9 R.T. 1780-1790; 10 R.T. 2016-2017.] Rather, the only communication to Mr. Burnaby concerned the date of loss determination made by the defendant after careful investigation of the facts, including a review of Mr. Burnaby's governmental claims and the taking of sworn testimony from him.

The Court of Appeal confuses the question of the validity of Mr. Burnaby's contract claim with the separate and distinct issue of what is necessary to support a finding of extracontractual liability. A contract claim may be established by evidence showing its validity. An extracontractual claim can only be established if there is no substantial evidence supporting denial of a claim. The Court of Appeal did not discuss any of the evidence on which the denial of the Burnaby claim was based, because it was apparently unaware of the correct legal standard.

Had the Court of Appeal studied the record more carefully, paying particular attention to the evidence cited in the appellant's opening brief, it would have discovered that there was ample evidence on which to base a denial of the Burnaby claim. Much of that evidence emanated from Mr. Burnaby himself, although Mr. Burnaby had changed his testimony by the time of trial on various important points. In any event, the denial of the claim was reasonable, as a matter of law, and there should be no extracontractual liability, even if Mr. Burnaby is entitled to an award for breach of contract.

If Mr. Burnaby recovers contract damages, he will have been paid twice for his house, which is still habitable and in relatively good condition. He should not be paid twice, because, if the plaintiff has rights under his contract with the defendant, the defendant also has rights, including the right to subrogation.

IV.

In View of Contractual Provisions, Equitable Principles, and the Public Policy Against Double Recovery, the Subrogation Rights of a Property Insurer Are Not Lost by the Denial of a Claim, Even Where the Denial Is Later Determined to Have Been in Error.

The contract between the plaintiff and the defendant establishes the right of subrogation. Even if it did not do so, such a right would arise by operation of law. In particular, insurance companies are given the right of subrogation due to the nature of a contract of insurance as a contract of indemnity. *Offer v. Superior Court,* 194 Cal. 114, 118 (1924). "[T]he insurer on paying the amount of the loss on

the property insured is subrogated only in a corresponding amount to the insured's right of action against any other person responsible for the loss." 194 Cal. at 118. See also, *Stein v. Simpson,* 37 Cal.2d 79, 83-84 (1951), and *Royal Indemnity Company v. Security Truck Lines,* 212 Cal.App.2d 61, 65-66 (1963).

Where an insured has received benefits from his insurer, and has also received benefits from a tortfeasor, the insurer may not maintain a subrogation action against the tortfeasor. Nonetheless, in order to avoid double recovery, the insurer may be able to "recover from its insured." *Conservatorship of Edwards,* 198 Cal.App.3d 1176, 1184 (1988). See also, *Board of Administration v. Glover,* 34 Cal.3d 906 (1983).

California courts have long refused to allowed insured parties to have double recovery for a single loss. *Waite v. Godfrey,* 106 Cal.App.3d 760 (1980); *May v. Miller,* 228 Cal.App.3d 404 (1991). Where subrogation rights exist, the collateral source rule does not apply. Rather, the policy of the law against double recovery controls. *Ferraro v. Southern California Gas Company,* 102 Cal.App.3d 33 (1980).

In holding that the defendant's subrogation rights have been extinguished, the Court of Appeal relies on an obscure decision of the Supreme Court of South Carolina, *Powers v. Calvert Insurance Company,* 216 S.C. 309 (1950). This decision was based on a finding of waiver. Any finding of waiver in the present case would represent a legal fiction. In California, waiver is strictly defined, as the intentional relinquishment of a known right. *Insurance Company of the West v. Haralambos Beverage Company,* 195 Cal.App.3d 1308, 1321 (1987). Neither at the present

time, nor at any time in the past, has the defendant intended to waive any of its rights. If it is forced to pay money to Mr. Burnaby, it would most definitely want a credit in the amount that Mr. Burnaby has already received from the governmental entities that he successfully sued.

If the decision of the Court of Appeal becomes final, Mr. Burnaby will have been paid several times over for a house that still stands, even if it is still in some danger. He has received his share of a lucrative settlement with the County of Los Angeles and other governmental entities. His judgment against the defendant in the present case includes not only the value of his house, as specified in his insurance policy with the defendant, but extracontractual compensatory damages, plus punitive damages. The award of punitive damages is particularly outrageous, in light of the facts of this case and its procedural history.

V.

An Award of Punitive Damages Based Only on a Finding of "Fraud" Is Neither Authorized by Statute Nor Constitutional, Where No Such Claim Has Been Pleaded or Proved.

Although the jury exonerated the defendant as to the claims of malice and oppression, it made an inexplicable finding to the effect that the defendant was guilty of "fraud." Based solely on this finding, the jury awarded half a million dollars in punitive damages. The award was made, even though no claim of "fraud" was presented to the jury, and the subject came up only during giving of jury instructions for the punitive damages phase of the trial.

Civil Code section 3294(e) defines "fraud" as "an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury." This definition appears to be a codification of the common law definition of fraud, as found in cases such as *Lesperance v. North American Aviation, Inc.*, 217 Cal.App.2d 336 (1963), and *Okun v. Morton,* 203 Cal.App.3d 805, 828 (1988).

Of course, there is no such thing as a cause of action for punitive damages. Rather, a claim for punitive damages is merely incident to some other cause of action. *Orient Handel v. United States Fidelity & Guaranty Company,* 192 Cal.App.3d 684, 697 (1987). Although fraud alone is an adequate ground for awarding punitive damages, the plaintiff must prove every essential element of fraud, including justifiable reliance. 192 Cal.App.3d at 697.

Fraud must be pleaded with particularity. *Scafidi v. Western Loan & Building Company,* 72 Cal.App.2d 550, 553 (1946). This rule is the "last remaining habitat of the common law notion that a complaint should be sufficiently specific that the court can weed out nonmeritorious actions on the basis of the pleadings." *Committee on Children's Television, Inc. v. General Foods Corporation,* 35 Cal.3d 197, 216 (1983). The specificity requirement also serves the purpose of notifying the defendant of certain definite charges, so that the defendant will be able to meet them intelligently. 35 Cal.3d at 216.

The plaintiff here did not plead fraud with specificity. He did not plead it at all, as of the commencement of trial.

The leading recent case analyzing the right to recover punitive damages on a fraud theory is *Commonwealth Mortgage Assurance Company v. Superior Court,* 211 Cal.App.3d 508 (1989). In this case, the trial court granted summary adjudication of the issue of punitive damages, finding that the plaintiff had no right to recover such damages. 211 Cal.App.3d at 517. The Court of Appeal disagreed with the reasoning of the trial court, but upheld its ruling, finding the plaintiff's common law fraud theory inadequate. 211 Cal.App.3d at 517. The court noted that "[i]f no cause of action for fraud has been stated, there is nothing to which punitive damages can attach." 211 Cal.App.3d at 518.

The Court of Appeal in *Commonwealth Mortgage* analyzed the factual allegations made by the plaintiff, and found that necessary elements of a fraud cause of action, including justifiable reliance and damage, were lacking. 211 Cal.App.3d at 518-521. Thus, the court concluded, "[a]s the pleading fails to state a cause of action for fraud, there is nothing to which a claim for punitive damages can attach," and "the trial court properly granted summary adjudication of the issue that CMAC [the plaintiff] could not recover punitive damages." 211 Cal.App.3d at 521.

In *Opsal v. United Services Automobile Association,* 2 Cal.App.4th 1197 (1991), discussed earlier in this brief, the plaintiff sued for breach of contract, breach of the implied covenant of good faith and fair dealing, and "fraud." The supposed fraud consisted of failure to advise the plaintiff of facts that might establish coverage and supposedly improper assertion of a defense. 2 Cal.App.4th at 1201. The jury made an express finding that there was

fraud, and awarded $1.7 million in punitive damages. 2 Cal.App.4th at 1201.

On appeal, the judgment in favor of the plaintiff in *Opsal* was reversed with directions to render judgment in favor of the defendant insurer, except as to contract damages. The plaintiff alleged that the insurer "acted in bad faith and committed fraud in connection with the denial of [his] claim." 2 Cal.App.4th at 1205. The jury agreed with the plaintiff "on both counts, awarding compensatory bad faith damages" for attorney's fees, as well as "punitive damages." 2 Cal.App.4th at 1205. Both of these causes of action were found invalid, as a matter of law. The resolution of the "bad faith" issue is discussed in a prior section of this brief. The *Opsal* court also rejected the plaintiff's contention that "the jury's finding of fraud is itself sufficient" to support the judgment. 2 Cal.App.4th at 1206. In particular, the Court of Appeal rejected the argument that there was a sufficient "fraud" claim based on statements made in the denial of the plaintiff's claim and also rejected the related contention that the insurer wrongfully concealed a legal theory on which the plaintiff might have relied. 2 Cal.App.4th at 1206-1207. Although *Opsal* does not specifically hold that there must be an independent cause of action for fraud before there can be any punitive damages based on a finding of fraud, such a holding is implicit in the court's decision.

Unfortunately, as in other portions of its opinion, the Court of Appeal makes a number of serious factual and legal misstatements in analyzing the issue of punitive damages. In reference to the issue, it is asserted that "Standard does not point this court to a timely and specific objection made to any evidence presented, any jury instructions given or any argument made to the jury on this issue."

(Opinion, page 28.) This statement is plainly wrong. As noted in this petition, and in the appellant's opening brief, a specific objection was made to the proposed standard punitive damages instruction on the ground that there was no cause of action for "fraud." [16 R.T. 3413.] In any event, in light of the provisions of *Code of Civil Procedure* section 647, no objection to the instruction was even required. As to evidence and argument, there was none, since there was no issue of fraud in the case.

The Court of Appeal asserts that "there is ample evidence, which is reviewed hereinafter, to justify the jury award of exemplary damages." (Opinion, page 30.) No such evidence is ever mentioned subsequently in the opinion. Presumably, the belated claim of "fraud" concerns the letter in which Mr. Burnaby's claim was denied, which asserted facts with which Mr. Burnaby disagreed. If *Civil Code* section 3294(e) is interpreted to embrace such a letter, as the Court of Appeal apparently has done, the consequences are staggering. The requirement of [proving] detrimental reliance on the part of plaintiffs claiming fraud would be eliminated.

The decision to deny the Burnaby claim was made prior to the time that the decision was communicated to Mr. Burnaby's attorneys. Mr. Burnaby in no sense relied on that communication, and the denial letter did not, by itself, cause any harm. It merely documented the defendant's position.

If the Court of Appeal is right in its novel interpretation of *Civil Code* section 3294(e), then punitive damages may be sought in any case, on any cause of action, where the defendant denies liability. In such a situation, if the plaintiff prevails, the denial can be characterized as false,

and the denial is the instrument of resistance to the plaintiff's claim. Such an expansive interpretation of the statute must be rejected.

The reliance of the Court of Appeal on *Arzaga v. Villalba,* 85 Cal. 191 (1890), and *Haigler v. Donnelly,* 18 Cal.2d 674 (1941), is misplaced. In *Arzaga,* the plaintiff's cause of action was based on conversion achieved by means of fraud, and such a cause of action is obviously a fraud cause of action as well as a conversion cause of action. All of the elements of a cause of action for fraud were present in *Arzaga,* thereby permitting punitive damages on the basis of fraud. In *Haigler,* the award of punitive damages was upheld on the basis of a finding of malice, not on a finding of fraud without a cause of action for fraud.

If the Court of Appeal has correctly interpreted *Civil Code* section 3294(e), the statute is unconstitutional, as applied to the facts of the present case. As of the time of trial, the operative second amended complaint contained no fraud cause of action, nor even an allegation of any supposed false statement of fact or concealment, by which the plaintiff was deprived of property. Without such notice of charges, the defendant has been deprived of its property without due process of law. "Notice is required before property interests are disturbed, before assessments are made, before penalties are assessed." *Lambert v. People of the State of California,* 355 U.S. 225, 228 (1957). The award of punitive damages is, of course, quasicriminal in character. In any event, the requirement of notice applies in civil as well as criminal cases. *Payne v. Superior Court,* 17 Cal.3d 908 (1976); *TXO Production Corporation v. Alliance Resources Corporation,* -- U.S. --, 93 Daily Journal D.A.R. 8072 (June 28, 1993).

The award of punitive damages, in the amount of half a million dollars, is an outrage. The defendant merely denied a claim under an insurance contract, after careful investigation, relying mainly on information from the claimant himself. Although the claimant changed his story, and was able to persuade a jury of the truthfulness of his new version of the facts, it cannot properly be said that the conduct of the defendant was fraudulent, so as to justify punishment of the defendant. The award of punitive damages is based on an erroneous and unconstitutional interpretation of *Civil Code* section 3294(e). It violates both the Constitution of the United States of America and the Constitution of the State of California.

VI.

Conclusion.

Based on the foregoing argument and authorities, it is respectfully submitted that this court should grant review and thereafter reverse the judgment of the Court of Appeal.

Since the plaintiff was uninsured at the time that he stated, in writing, that his house was a total loss due to landslide damage, he is not entitled to coverage under a subsequently purchased homeowner's policy. He is certainly not entitled to massive extracontractual compensatory damages or to punitive damages based on a finding of "fraud," where no such claim was pleaded or proved. This court has the duty to correct a million dollar injustice, and clarify the applicable law.

Respectfully submitted,

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Attorneys for Defendant and Appellant,
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PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 9105 Sunset Boulevard, West Hollywood, California 90069; that on July 9, 1993, I served the within *Petition For Review* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, California Supreme Court
Ronald Reagan Building
300 South Spring Street
2nd Floor
Los Angeles, California 90013
(Hand-Delivered: Original and 14 Copies)

Clerk, California Court of Appeal
Second Appellate District
Division One
2nd Floor, North Tower
300 South Spring Street
Los Angeles, California 90012

Mr. A. Tod Hindin
8383 Wilshire Boulevard, Suite 400
Beverly Hills, California 90211

Clerk of the Superior Court for
the County of Los Angeles
Honorable Richard G. Harris, Judge
1725 Main Street, Department P
Santa Monica, California 90401

Mr. Michael M. Berger
BERGER & NORTON
1620 26th Street, Suite 200 South
Santa Monica, California 90404

I declare under penalty of perjury that the foregoing is true and correct. Executed on July 9, 1992, at Los Angeles, California.

Betty J. Malloy
(Original Signed)

§ 3294. (a) In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.

(b) An employer shall not be liable for damages pursuant to subdivision (a), based upon acts of an employee of the employer, unless the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice. With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation.

(c) As used in this section, the following definitions shall apply:

(1) "Malice" means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.

(2) "Oppression" means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights.

APPENDIX I

(3) "Fraud" means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.

(d) Damages may be recovered pursuant to this section in an action pursuant to ***Chapter 4 (commencing with Section 377.10) of Title 3 of Part 2 of the Code of Civil Procedure*** based upon a death which resulted from a homicide for which the defendant has been convicted of a felony, whether or not the decedent died instantly or survived the fatal injury for some period of time. The procedures for joinder and consolidation contained in Section ***377.62*** of the Code of Civil Procedure shall apply to prevent multiple recoveries of punitive or exemplary damages based upon the same wrongful act.

(e) The amendments to this section made by Chapter 1498 of the Statutes of 1987 apply to all actions in which the initial trial has not commenced prior to January 1, 1988.

Section 1 of the Fourteenth Amendment to the Constitution of the United States of America provides that:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

APPENDIX J

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 9105 Sunset Boulevard, West Hollywood, California 90069; that on November 24, 1993, I served the within *Appendix To Petition for Writ of Certiorari, Volume II of II (Appendix H to J)* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail, at Los Angeles, California, addressed as follows:

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Clerk of the Superior Court for
the County of Los Angeles
Honorable Richard G. Harris, Judge
1725 Main Street, Department P
Santa Monica, California 90401

I declare under penalty of perjury that the foregoing is true and correct. Executed on November 24, 1993, at Los Angeles, California.

Betty J. Malloy
(Original Signed)